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(I)

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 223

SAMUEL C. PANDOLFO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the circuit court of appeals affirming the conviction (R. 693-702) nor the dissent of Circuit Judge Phillips to the order denying a petition for rehearing (R. 703-704) has yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 18, 1942 (R. 702), and petition for rehearing denied June 16, 1942 (R. 703). The petition for writ of certiorari was filed July 13, 1942. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether petitioner was substantially prejudiced by testimony as to the bid and asked prices of securities which he transferred at a profit to himself to a company to which he stood in a fiduciary relation.

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed

within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was indicted in the United States District Court for the District of New Mexico on March 26, 1941. He was charged in eight counts with devising a scheme to defraud and the utilization of the United States mails in connection therewith in violation of the mail fraud statute, and in four counts with violating the Securities Act of 1933 (15 U. S. C. 77e (a) (2)). (R. 1-58.) He was convicted on the mail fraud counts (R. 63-64), and received sentences of five years, and fines of one hundred dollars on each of the eight counts. The sentences were arranged to impose a total of ten years' imprisonment (R. 64-65). His conviction was unanimously affirmed by the circuit court of appeals (R. 693-702), but on motion for rehearing Judge Phillips dissented on the ground that the testimony of one Fisher was incompetent and prejudicial (R. 703-704).

Petitioner organized a corporation called the Old Line Insurance Shares Corporation which he

represented, while selling its stock, to be a small loan company (R. 67, 77, 81, 86; Exs. 5, 6, 7, 8, 12, 17). A large part of the funds received from the stock sales was not in fact turned over to the corporation. Instead, petitioner retained such funds and transferred securities purchased by him to the Old Line Company at excessive valuations, retaining the difference for his own use, without advising the stockholders or directors of the Company (R. 82, 89, 165, 166, 167, 169, 183-184).

The affairs of the Old Line Company were in the sole control of petitioner who had complete charge of all its policies and operations including the preparation of all minutes passed at stockholders and directors' meetings (R. 93-94). No profits were ever made by the Old Line Company, the interest payments which were made being derived from capital (R. 92).

ARGUMENT

Petitioner challenges only the holding of the circuit court of appeals (R. 698-699) that he was not prejudiced by the admission of the testimony of Fisher, a government witness, concerning the market value of some of the securities which petitioner transferred to the Old Line Company (Pet. 2).¹ However, in our view, whatever may have

¹ Fisher was the manager of the National Quotations Bureau, which was engaged in making reports and records of bid and asked prices of unlisted securities. It furnished information sheets to about 1700 subscribers "and transac-

been the value of the securities is unimportant. Even though it be assumed that petitioner transferred the stock to the Company at the fair market price, the indictment charged, and petitioner does not deny, that while he was in control of the Company, he transferred the securities "at prices substantially in excess of prices paid by" him (R. 9) and "did convert to his own use and benefit a large part of the proceeds realized from the sale of" the Company's stock (R. 8), thus deriving a secret profit from his fiduciary position at the expense of the stockholders, in violation of the mail fraud statute. *Glover v. United States*, 125 F. (2d) 291, certiorari denied, May 25, 1942, No. 1158 last Term, *Groves v. United States*, 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied October 27, 1941, No. 605 last Term; *Leche v. United States*, 118 F. (2d) 246 (C. C. A. 5), certiorari denied October 13, 1941, No. 169 last Term; *Shu-*

tions are consummated as a result of the prices shown in the sheets. In other words, the sheets contain the market for the various securities, and more or less constitute the proceedings or start the proceedings for trading in the various particular securities listed herein" (R. 106-107). There was no testimony, however, of any sales which were actually consummated on the basis of the quotations supplied. The circuit court of appeals expressed doubt as to the admissibility of Fisher's testimony, but found that it was unnecessary to consider seriously "the question of its probative value," because it was of the view that there was sufficient other evidence to show that the market price of the securities was less than that which petitioner charged the company. (R. 699.)

shan v. United States, 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574; *Buckner v. United States*, 108 F. (2d) 921, 926, 927 (C. C. A. 2), certiorari denied, 309 U. S. 669. Hence, we think it is clear that so long as petitioner foisted the stock upon the company for more than he paid for it, the evidence complained of was both immaterial and non-prejudicial.²

This view is wholly consistent with the trial court's charge to the jury. Cf. *Nash v. United States*, 229 U. S. 373, 379-380. It is true that there is language in the instructions which indicates that the jury could convict if they found that petitioner had transferred the securities to the company at prices "in excess of their reasonable value," or upon a finding that the transfer was made at prices "in excess of the amounts for which they had been purchased" (R. 192). But since the court charged that, in either event, the jury was to acquit if "the defendant did not personally profit from such stock transactions" (R. 192), and since it is uncontradicted that petitioner made no disclosure of his profits, the jury must necessarily have found him guilty of violating his fiduciary obligation, and it is unnecessary

² We are inclined to agree with petitioner, however, that the prices he paid for the securities is not "irrefutable evidence" of their market value, as the court below thought (R. 699). Petitioner also testified that he sold some of the same kind of securities to others for more than he charged the company (R. 162-165).

to speculate as to whether the jury may also have found, upon incompetent evidence, that the securities were transferred for more than their market value. Cf. Government's Brief in Opposition in *Shushan v. United States, supra*, Nos. 910-913, October Term, 1940, pp. 16-17.

CONCLUSION

The case was correctly decided below and there is presented no question of general importance or any conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari be denied.

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AUGUST 1942.